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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE PROCTER & GAMBLE MANUFACTURING COMPANY
PORT IVORY, NEW YORK, PLANT
KANSAS CITY, KANSAS, PLANT
DALLAS, TEXAS, PLANT
BALTIMORE, MARYLAND, PLANT
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer has a statutory obligation to create and grant leave from scheduled work for employees in one bargaining unit to negotiate contracts on behalf of other bargaining units at other locations represented by different Unions, where the Board and the lower court found that the employer's denials of Union leave requests for such purposes were lawful under the existing labor agreements?

2. Whether the Board has the authority to order an employer prospectively (a) to grant leave to employees in one bargaining unit to represent another Union's bargaining unit in negotiating the latter unit's agreement; (b) to negotiate on plant premises; (c) to pay local Union negotiators; and (d) to pay the full cost of negotiating facilities?

3. Whether an employer who has voluntarily bargained on plant premises and paid Union negotiators in past negotiations has a statutory obligation to continue such practices, despite having discontinued them by agreement or after bargaining to an impasse?

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v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 4, 1981.

I.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 658 F.2d 968 (4th Cir. 1981), and appears in the Appendix hereto at pp. 1a-34a. The Decision and Order of the National Labor Relations Board is reported at

248 NLRB 953 (1980), and appears in the Appendix at pp. 35a-41a. The recommended Decision of the Administrative Law Judge in this case is reported at 248 NLRB at 955 (1979), and appears in the Appendix at pp. 42a-111a. The lower court's Order of January 8, 1982, denying Petitioner's Motion for Rehearing appears in the Appendix at p. 112a.

II.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on September 4, 1981, with a 2-1 vote. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 8, 1982, again with a 2-1 vote. Petitioners' application for an extension of time within which to file our Petition for a Writ of Certiorari was granted by Chief Justice Warren E. Burger on April 1, 1982, extending our time to and including June 7, 1982 (see Appendix at p. 113a). The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 158(a) It shall be an unfair labor practice for an employer —
>
> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> • • •
>
> (5) refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.
>
> Section 158(d) [in pertinent part] the purposes of this section, to bargain collectively is the performance

of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 159(a) [in pertinent part] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

IV.

STATEMENT OF THE CASE

This case involves an order by the National Labor Relations Board ("the Board"), enforced by a divided three-judge panel of the Court of Appeals, holding that an employer, who correctly interpreted its collective bargaining agreements by denying time off to employees to participate in negotiations for separate unions representing bargaining units other than their own, should nonetheless have created and granted "an alternative form of uncompensated leave" for its employees (A. 103a).

The case also involves the validity of an order that the Company *in futuro* create and grant leave to employees in one bargaining unit to negotiate on behalf of different unions representing different bargaining units; pay local union negotiators; bargain on plant premises; and grant plant access to non-plant personnel to participate in the bargaining for a separate

unit that does not represent them. Further, if bargaining is conducted off plant premises, the Company is ordered to pay the full cost of the bargaining facilities.

Parties to the Proceedings

The parties are four plants of The Procter & Gamble Manufacturing Company and four independent Unions representing the four separate bargaining units at these plants. These plants are located in Baltimore, Dallas, Kansas City, and Port Ivory, Staten Island, New York.

How the Cases Arose

These cases grew out of a series of separate contract negotiations between each of four plants of the Company and four respective independent Unions which represent the employees at each particular location in separate bargaining units. The negotiations took place between October 1976 and December 1977. Several months before negotiations began at the first plant (Port Ivory), the four Unions had declared their common intent to establish "a multi-plant unit or units". This goal of multi-plant bargaining is unlawful if attempted to be enforced unilaterally.[1] As was its right, the Company was opposed to multi-plant bargaining.

When employees from other plants who were officials in other Unions showed up at Port Ivory's first bargaining session, the Company was uncertain as to which unit they purported to represent and did not want inadvertently to be drawn into multi-plant bargaining. It, therefore, questioned them about their role. They stated that their role was to help Port Ivory's independent Union negotiate its own contract. As the Board found, the Company then readily agreed to negotiate, recognizing the right of the Port Ivory Union to select its own bargaining committee and, under the principle of *General Electric Co. v. NLRB*,[2] to include persons outside its unit on such committee. No objections to their presence were raised at

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[1] *Minnesota Mining and Manufacturing Co. v. NLRB*, 415 F.2d 174, 176-77 and n. 2 (8th Cir. 1969).

[2] 173 NLRB 253 (1968), *enf'd.* 412 F.2d 512 (2d Cir. 1969).

Port Ivory or at the other three plants when non-plant employees also attended their respective negotiations. The Administrative Law Judge ("ALJ"), the Board, and the lower court concluded that the Company never refused to meet and bargain with the Unions' own selected committees.

The Union Leave Issue

Port Ivory was the first plant where negotiations were conducted. As the negotiations began, Union officials in the three different Unions at the three other plants (where negotiations were *not* in progress) requested Union leave under their respective contractual Union business leave provisions to participate as members of the bargaining committee for the separate, independent Union at Port Ivory. When questioned by the management at the plants where they worked, these employees made it clear that they were not seeking to represent their *own* plant's bargaining unit. Rather, they stated that they intended to serve as Union negotiators for the Port Ivory bargaining unit. A similar process was repeated at the other three plants as negotiations began at each.

Management at each plant denied these Union leave requests because each plant's contract clearly provided Union leave only to pursue the business of the particular Union at that plant. The Board and the court below found that plant management was *correct* in denying the leave requested under each plant's Union business leave provision.[3] No request for any other type of leave of absence was ever made at any of the four plants. Therefore, the necessary effect of the holding here is to impose upon the Company a *statutory* obligation to grant leave to each plant's employees to bargain on behalf of *other* plant Unions and bargaining units.

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[3] Indeed, while the Board grudgingly admits that the Company correctly interpreted its contractual Union business leave provision, it approvingly cites the ALJ's finding that "the Company's application of that provision ... operated to unlawfully interfere with the unions' use of outsiders" (Bd. Brief to Fourth Circuit, pp. 36-37). Thus, the Board announces the new principle that an employer who lawfully insists upon enforcing the provisions of its collective bargaining agreement in the face of Union demands to ignore them, thereby establishes one of the essential elements of an unfair labor practice.

The Plant Access Issue

Each plant had a long-standing, non-discriminatory plant security rule which barred access to non-plant employees, including employees of other Procter & Gamble plants, except on limited guided tours. Thus, it was obvious that the bargaining which had previously taken place on plant premises would have to be held elsewhere in order to accommodate each Union's desire to have non-plant employees present. Otherwise, the plant access rule would have to be violated. Bargaining off plant premises in no way excluded non-plant employees from the negotiating process, but actually facilitated the Unions' objective. Despite this, the Board held that the Company must waive its plant rules in order to permit non-plant employees to bargain on plant premises.

Resolution of Pre-negotiation Issues

To resolve the pre-negotiating issues which first arose at Port Ivory, two meetings were held at the instance of the Company. As a result of these meetings, the ground rules for negotiating were agreed upon: bargaining would be off-premises; the cost of negotiating facilities would be split between management and the Union; and there would be no pay to local employee negotiators.[4] In the three remaining plants, the same issues of situs for bargaining and pay for negotiators were discussed and, after agreement or impasse, similar ground rules were followed.

* * *

The negotiations then proceeded plant by plant, and collective bargaining agreements were reached with the Unions' mixed negotiating teams at each location without strikes. Indeed, at three plants, agreement was reached prior to the expiration of the previous contracts.

The ALJ's Findings

The Unions filed charges, and the General Counsel issued five complaints which were consolidated for hearing before an

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[4] The Union at Port Ivory itself approvingly recited these ground rules at the first negotiating meeting on October 6, 1976 (see Court of Appeals Record, A. 239-40, 1149, 1179-80).

ALJ in Brooklyn, New York. The ALJ made specific rulings favorable to the Company on issues of fact and law that are clearly inconsistent with the ultimate decision of the ALJ, the Board, and the Court below. These findings are:

(1) There was *no* contractual obligation for the Company to grant the Union business leave requested (A. 97a, 103a).

(2) There was *no* statutory right for the Union to bargain on plant premises (A. 96a).

(3) There was *no* statutory obligation for the Company to pay Union negotiators (A. 96a).

(4) The Company at all times acknowledged the right of each Union to bring non-unit employees onto their bargaining team (A. 94a).

(5) The Company did *not* refuse to meet with each Union's mixed negotiating team (A. 97a, 103a).

(6) The Company did *not* refuse to bargain with these mixed committees (A. 103a).

(7) The Company did *not* negotiate in bad faith with no intention to reach agreement (A. 104a).

(8) The Company did *not* negotiate in bad faith concerning substantive issues (A. 48a, 104a).

(9) The Company did *not* commit an unfair labor practice by threatening to discipline employees who, after Union business leave was properly denied, still used it to participate in another unit's bargaining (A. 104a).

Nevertheless, the ALJ, in a Decision adopted by the Board and a majority of the three-judge panel, ruled that the Company violated Sections 8(a)(1), (3),[5] and (5) of the Act (A.

[5] For purposes of this Petition, the Company is not challenging the Section 8(a)(3) finding concerning vacation leave denial because of its insignificance. The Board admits that at least eight employees used vacation leave to participate in negotiations at other plants (A. 101a-102a). Only two employees made vacation requests which were denied, and one of those denials concerned a day when no bargaining took place. In short, even if the Unions' "right" to such leave existed, it has not been violated here.

99a, 103a). The ALJ's recommended Order provided that in future negotiations the Company must (1) create and grant "uncompensated leave and/or vacation time to its employees to ... attend and participate in contract negotiations as a representative of the Union which is the bargaining representative of the employees at another of the Respondent's plants ...."; (2) "make its plant premises available to any of the Union [sic] ... for the purpose of negotiating ... [even though] the Union involved in the negotiations has ... designated persons not employed in the bargaining unit to attend and participate in the negotiations ...."; and (3) pay "plant employees on the negotiating committee ... for ... time spent in negotiations ...." (A. 109a).

Inexplicably, the ALJ ordered the Company to meet and bargain with each Union's mixed bargaining committee, although he had specifically found that there was *no* such refusal. Thus, there is no predicate for such an Order. Nonetheless, the Board and court below adopted it.

The Board's Findings and Order

On appeal, the Board adopted the ALJ's Findings of Fact and his recommended Order with little comment. In addition, the Board ordered the Company to pay each Union's share of their agreed-upon costs for the off-site bargaining facilities. The Board also ordered the Company to pay local unit negotiators for working time lost while bargaining during the 1976-77 round of negotiations. The Board did so despite the fact that these items were agreed to or were bargained to impasse.

The Court of Appeals Decision

The parties herein filed a Joint Petition for Review and Cross-Application for Enforcement of the Board's Decision and Order, pursuant to Sections 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), in the United States Court of Appeals for the Fourth Circuit on September 29, 1980. The lower court in a 2-1 decision granted enforcement of the Board's Order (A. 3a).

The lower court majority accepted the Board's rationale that the Company was obligated, as a matter of law, (1) to create and grant a type of uncompensated leave to assure the presence at each plant of Union negotiators from the other plants, (2) to make plant premises available for negotiations with other plants' employees present, and (3) to pay local Union negotiators for wages lost while in negotiations.

The lower court also held, clearly incorrectly, that it "need not decide" the *H.K. Porter Co., Inc. v. NLRB* issue [6] because the Board's order did "not impose new contractual provisions" (A. 31a).

Senior Circuit Judge John A. Field, Jr., filed a dissenting opinion on two basic grounds.

1. Judge Field found that after following certain bargaining procedures for many years, *the Unions* started "a new and different ballgame" during which they could "not continue to play under the rules of the old game" (A. 33a). But, as he stated, "that is exactly what the Board has ordered and the majority unfortunately has approved" (A. 33a).

Judge Field further pointed out that both the Board and the lower court majority had conceded that the Company

> did not refuse to bargain with a committee containing "outsiders", but merely declined to continue ... negotiating on plant premises and ... paying local employee negotiators. The majority concedes that an employer has no duty to do either of these things, ... [A. 33a.]

Judge Field also noted that

> The company and the union negotiated with respect to the ... site of the bargaining sessions, and the parties agreed upon the site as well as the sharing of the costs of such facilities. [A. 33a.]

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[6] 397 U.S. 99 (1970).

In sharp disagreement with these inconsistencies in the majority's findings, Judge Field stated:

> Despite this fact [negotiating and agreeing as to situs] the majority concludes that the company must not only make its premises available for future negotiations, but must reimburse the union for the rental cost which the union had agreed to pay incident to the 1976 bargaining sessions. [A. 33a.]

2. Judge Field's second ground of dissent related to the *NLRB v. American National Insurance Co.*[7] and *H.K. Porter, supra,* issues. Judge Field correctly asserted:

> The Board's order forces Procter and Gamble to capitulate on three bargaining issues—make the plant premises available for negotiations, pay local employee negotiators, and grant employees uncompensated leave to participate in negotiations at another company plant. I agree with counsel for the employer that such forced capitulation is beyond the Board's remedial power and flies in the face of *H.K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1970), by compelling Procter and Gamble to agree to a proposal of the union and requiring that it make concessions on bargainable issues. I am in accord with the observation of Judge Wood in *National Labor Relations Board v. Indiana and Michigan Electric Company,* 599 F.2d 185, 192 (1979) that "the union camel has been constantly circling the company tent probing for a way to stick its nose under [and] [n]ow the Board itself has indirectly lifted the edge of the tent to make it easy". In my opinion the Board has no authority whatever to punish a company because it opposes a union, nor does it have the authority to force a company to facilitate the unions' efforts to attain their objectives. [A. 33a-34a.]

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[7] 343 U.S. 395 (1952).

V.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises An Important Recurring Issue Of Law Which Has Not Been, But Should Be, Resolved By This Court

This case presents a significant,[8] unresolved issue of whether an employer has a statutory obligation to create and grant leave from scheduled work for employees in one bargaining unit to negotiate labor contracts for different bargaining units represented by other Unions, where the Board and the court below expressly found that the Company's denials of Union leave requests for precisely the same purpose were lawful under each plant's contract. The issue is *statutory* because the Board and lower court specifically found that the Company correctly applied the *contractual* Union leave provisions.

It is essential to comprehend the overreaching nature of this order with respect to creating a new leave of absence provision. The Board and lower court have held that each of the three plants *not* involved in the negotiations taking place at the fourth plant, nonetheless have a bargaining obligation to create some form of leave that will benefit *not* their own bargaining unit, but rather will benefit a separate bargaining unit at the plant where negotiations are being conducted.

One of the fatal errors in this order is that it violates one of the most fundamental principles governing the *scope* of the statutory bargaining obligation. It ignores the established principle that *the parameters of the bargaining unit define the limits of the bargaining obligation.*

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[8] The importance of the Union leave issue here is shown by the prevalence of those provisions in collective bargaining agreements. Nearly sixty percent (60%) of the agreements covering bargaining units each including at least 1000 employees contained some type of leave of absence for Union business. (See, "Characteristics of Major Collective Bargaining Agreements", U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin 2013 (1979).) Thus, the Board's *per se* rule in this case has a profound and widespread impact.

This Court has defined the bargaining obligation as "the duty to bargain unit by unit". *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666 (1965). This Court elaborated on that principle in *Allied Chemical and Alkali Workers of America, Local Union No. 1*, 404 U.S. 157 (1971).

In *Allied Chemical*, after referring to the interrelationship of Section 8(a)(5), Section 8(d), and Section 9(a), this Court said:

> This obligation [to bargain collectively] extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents. [404 U.S. at 164].

Thus, this Court agreed with the Sixth Circuit in *Allied Chemical*, both Courts stating that:

> It has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation * * *. [404 U.S. at 165, quoting from 427 F.2d 936, 945.]

Totally inconsistent with its finding in this case, the Board, itself, has acknowledged that the bargaining obligation of Section 8(a)(5) is confined to the particular bargaining unit found appropriate under Section 9(a). Thus, in *Utility Workers Union of America, AFL-CIO, and Local 111, et al., (Ohio Power Co.)*, 203 NLRB 230, 238, *enf'd.* 490 F.2d 1383 (6th Cir. 1974), the Board held:

> The duty imposed ... by the ... Act ... to bargain collectively is predicated on the cardinal principle that the existing unit ... fixes the periphery of the bargaining obligation.

This means that each plant's bargaining obligation is owed solely to its own separate bargaining unit. Here the Company fulfilled that obligation. Each already had a Union business leave provision for attending to the business of that local Union only. The ALJ, the Board, and the lower court conceded this. They also conceded, as did the employees themselves, that the

leave requests at issue in this case were made to benefit bargaining units *other than their own.* Thus, for example, when the Board ordered the Baltimore plant to grant leave for its employees to help with Port Ivory's negotiations, it was necessarily finding a duty to bargain *at Baltimore, across unit lines,* for the sole benefit of the Port Ivory bargaining unit. It is also noteworthy that when Port Ivory was negotiating, the Baltimore contract was not even open for re-negotiation.

The Board, itself, has held that there is no statutory right on the part of a Union to obtain leave for its members to engage in bargaining, even within their own bargaining units. *Borg-Warner Controls,* 198 NLRB 726, 729 (1972); cf. *Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615 (1962).[9] That being true, certainly, there can be no statutory right to obtain leave to bargain for *other* Unions in *separate* units at *other* locations. Nevertheless, the Board, with the lower court's approval, has ordered the Company here to create and grant some form of uncompensated leave to bargain on behalf of employees who are members of different units. Moreover, they have done this despite their finding that the Company correctly interpreted the negotiated Union leave provision in effect at each plant as limiting leave to attending to the business of the particular Union at that plant. The Board further found that bargaining for a different unit was *not* local Union business, and hence was not covered by this contractual provision (A. 97a).

Absent the statutory obligation, which does not exist, these two contractual findings cannot be reconciled with the Board's order that uncompensated leave must be granted here.

Therefore, the Board's finding, some 35 years after the Act's passage, of a new statutory obligation to grant leave across unit lines is in flagrant violation of the explicit limits in Sections 8(a)(5) and 9(a) of the Act, as this Court has implemented it. Clearly, this finding is not permissible.

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[9] Neither the ALJ nor the Board announced any disagreement with these holdings.

Thus, in addition to admitting that there is no statutory right to obtain Union leave, even within the bargaining unit, the Board and lower court further concede that in this case the contractual Union leave provisions did not provide for the leave requested. Given these two conditions, we submit that there is no basis[10] for imposing upon the employer a duty to create and grant some new form of leave for employees to travel to other plants and bargain for entirely separate units represented by separate Unions.[11]

Yet, the Board and lower court found that the failure to create and grant a wholly new kind of leave, not even requested by the Unions, was unlawful (A. 103a; 13a).[12] Their theory was that the Company should have "created", or at least taken "the first shot" at creating, some other form of leave to accommodate the Unions (A. 14a). This finding is even more irrational in that the issue did not appear in any of the complaints, nor was it ever litigated.

The Board and lower court seek to equate the "right" to Union leave with the acknowledged right of a Union to select its own bargaining agent. The equation is faulty. There is no

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[10] In an attempt to find a contractual basis, the lower court went beyond its function as a reviewing court when it combed the record to find that contracts of two plants contained provisions for *personal leave* which "could easily cover" the leave requested here (A. 13a). No employee requested personal leave. These provisions were not mentioned in the complaints nor litigated before the Board. The meaning and application of these personal leave provisions were never determined. (Had the issue been raised before the Board, and litigated, the evidence would have shown that personal leave had been granted only for compelling personal and family crises.) In fact, there is *no* personal leave provision in Baltimore's contract. Yet, the court majority relies heavily on those provisions to argue that the Board was not dictating substantive contract provisions in violation of *H.K. Porter* (A. 13a-14a).

[11] In any event, although at the beginning of negotiations at Port Ivory, the Unions were aware of the plant managements' interpretation of the Union leave provision, they never attempted to negotiate an expanded leave provision as the successive contracts came open in 1976-1977.

[12] The Board did not give the employer an option to grant vacation days instead of Union leave. The use by the Board of the term "and/or", in referring to granting Union and/or vacation leave (A. 107a), can be construed as meaning that the Unions could demand *either* or *both* of them.

issue here of the right of the Unions to select their own bargaining representatives and to compose mixed negotiating committees. Instead, the question is their right to obtain the creation of a new Union leave provision granting leave to serve only the interests of *other* bargaining units, contrary to the Union leave provisions already in their collective bargaining agreements. Thus, the cases principally relied upon by the Board and the court below are not on point. They are the traditional cases dealing with the right to include non-employees on the Union's bargaining committee. *Standard Oil Co. v. NLRB*, 322 F.2d 40 (6th Cir. 1963); *Minnesota Mining and Manufacturing Co. v. NLRB, supra; General Electric Co. v. NLRB, supra.* Since it is admitted that the Company met and bargained to agreement with the four Unions' mixed negotiating teams, obviously the Company never challenged the Union's right to select its bargaining agent.

The Court of Appeals and the Board also placed inappropriate reliance on the Seventh Circuit decision in *NLRB v. Indiana & Michigan Electric Co.*, 235 NLRB 1128 (1978), supplementing 229 NLRB 576 (1977), *enf'd.* 599 F.2d 185 (7th Cir. 1979), *cert. denied* 444 U.S. 1014 (1980).

There are at least two significant differences between that case and the instant case. In *Indiana & Michigan*, the four contracts contained *no* Union leave provision that restricted leave to the business of the contract bargaining unit. Moreover, there *was* a past practice of freely granting leave to employees, who were all members of the same local Union, to attend and participate in one another's negotiations. Here the facts are directly opposite.[13] Thus, *Indiana & Michigan* cannot be said to have even remotely resolved the important issues here.

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[13] Indeed, the record shows that the Union leave provision was submitted to arbitration at Dallas, and the Arbitrator agreed that it did not provide for leave to assist another unit in its contract negotiations. This award was one of the grounds cited by the ALJ in his finding that the employer correctly denied the requested Union leave (A. 58a). Thus, employees who requested Union leave to attend the initial bargaining session at Port Ivory could hardly have been surprised when their requests were denied. Even though the Board has agreed with the Arbitrator's ruling that the Company correctly interpreted the contractual leave provisions, it now directs the Company to rewrite the contracts by granting "some alternate form of uncompensated leave" (A. 103a).

B. The Decision Below Raises A Conflict Between The Fourth And The Sixth Circuits

The decision below is in sharp conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Grief Bros. Corporation v. NLRB*, 635 F.2d 531 (6th Cir. 1980). In *Grief Bros.*, the Board held that the employer interfered with the protected concerted activity of its employees when at twenty-one (21) different plants it denied them unpaid leave to attend an international union conference. The Board and the court found that the employer had freely granted both union and personal leave in the past. They also found that the employer had based its denial upon its opposition to coordinated bargaining, which was the subject matter of the conference. Further, they found that the employer gave no other business justification for its leave denial.

The Sixth Circuit denied enforcement, holding that neither the employer's departure from its established leave policy because of its objection to coordinated bargaining, nor its failure to rely upon business necessity for its leave denial, justified the Board's finding of a violation of the Act.[14] The lower court was made aware that *Grief Bros.* directly contradicted the Board's decision, but the majority did not address the case.

Although *Grief Bros.* deals only with the Union leave issue, the doctrine enunciated therein is also applicable to the Board's order concerning the plant access rule, pay for negotiators, and pay for bargaining facilities. The Sixth Circuit's decision in *Grief Bros.* was based upon *H.K. Porter's* principles, and stands

[14] The Sixth Circuit cited its own previous decision in *NLRB v. Superior Co.*, 199 F.2d 39 (6th Cir. 1952), as controlling. In *Superior Co.*, despite a past practice of liberally granting leave, the court held that the employer was justified in refusing to grant leaves of absence for employees to serve on a union committee at an informal conference between the employer and the Board prior to a consent election. The employer had notified the Board that it would meet only with it, and not with the union, and the Board had not requested the employees' presence. See also, *Service Employees International Union v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

for the same tenet that Judge Field states in his dissent in the case at bar:

> [T]he Board has no authority whatever to punish a company because it opposes a union, nor does it have the authority to force a company to facilitate the union's efforts to attain their objectives.

C. The Decision Below Conflicts With Landmark Decisions Of This Court Denying The Board Authority To Dictate The Substantive Terms And Conditions Of Employment

The Board order in this case conflicts with the decision of this Court in *NLRB v. American National Insurance, Co., supra,* and *H.K. Porter Co., Inc. v. NLRB, supra.*

American National Insurance first established, contrary to the then-prevalent view of the Board, that it is not within the province of the Board to intrude upon the collective bargaining process and attempt to dictate the substantive terms and conditions of employment. The Board had ordered that employer to withdraw a demand for a broad management rights clause which would have committed to the unilateral control of the management some significant decisions relating to working conditions, such as promotions and layoffs, and excluded these matters from arbitration.

Emphasizing the essential freedom of the collective bargaining process, this Court upheld the employer's right under the Act to make and to insist to impasse on this proposal, and rejected the Board's authority to order its withdrawal. This Court admonished the Board not to attempt, under the guise of remedying an unfair labor practice,

> either directly or indirectly, [to] compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. [343 U.S. at 404.]

But the Board does not learn its lessons easily. Several years later, in *H.K. Porter,* the Board strayed from this Court's admonition in *American National Insurance.*

In *H.K. Porter*, the employer had refused to grant a checkoff provision. The Board, the lower court, and this Court found that the employer in that case had bargained in bad faith on the dues checkoff proposal. The Board's remedial order to grant the checkoff provision was enforced by the lower court. Yet, again, this Court said "no" to the Board's "remedy".

Even though he agreed that the employer had acted in bad faith, Justice Black, writing on behalf of the Court majority, reminded the Board of the fundamental rule of *American National Insurance*. Mr. Justice Black cogently stated:

> [W]e do not agree that . . . the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d) . . . One of these fundamental policies is freedom of contract. . . .
>
> In reaching its decision the Court of Appeals relied extensively on the equally important policy of the Act that workers' rights to collective bargaining are to be secured . . . . But the Act . . . does not contemplate that unions will always be . . . able to achieve agreement. . . . It may well be true . . . that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. [*Id.*, 397 U.S. at 107-09.]

Yet, the Board's decision here does even more than was forbidden by this Court in *H.K. Porter*. Here, although a Union leave provision existed which admittedly did not provide for the leave requested, the employer is ordered to create and grant "an alternative form of uncompensated leave" (A. 103a) to suit the Unions' objectives. Moreover, the Board and lower court ordered the Company, *in futuro*, to open up its premises to non-plant personnel, to pay Union negotiators, and to pay the full cost of any joint bargaining facilities where there is a mixed negotiating committee.

The ALJ, the Board and the court below acknowledged, as they must, that the Union had no statutory right to bargain on plant premises or to receive pay for Union negotiators (A. 96a). *McCulloch Corporation*, 132 NLRB 201, 205 (1961); *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105, 112-14 (1956); *Hudgens v. NLRB*, 424 U.S. 507 (1976). But, they have held precisely the opposite here.

On the issues of the situs of bargaining and pay for negotiators and facilities, the parties bargained either to agreement or to impasse. The lower court says that the Unions' agreement to the ground rules was a "forced agreement", but where is the evidence of force? The court did not define what constitutes a "forced agreement". Under *Axelson, Inc., Subsidiary of U.S.A. Industries, Inc. v. NLRB*, 599 F.2d 91, 95 (5th Cir. 1979), enforcing 234 NLRB 414 (1978), these ground rules are subjects of mandatory bargaining. Thus, the parties must bargain about pre-negotiating issues, but no one is required to yield. The Unions had the option of saying "no". They all chose to agree—some under protest and others without qualification. Agreement made under protest is no less an agreement. That is the essence of bargaining. Accordingly, the employer did not obligate itself to pay for negotiators or for facilities, and the Board may not order such an agreement.

The lower court's handling of the *H.K. Porter* issue is truly inexplicable. The court majority attempted to circumvent this issue by holding that "the prohibition simply does not impose new contractual provisions on the parties" (A. 31a). The lower court appeared to perceive a difference between what the Board did here—which was to order the Company to "*cease and desist from*" the *negative* acts of denying Union leave, refusing to bargain on plant premises, and refusing to pay negotiators—and what the Board was prohibited from doing by *H.K. Porter*, which was to *affirmatively* direct the Company to grant leave, to bargain on plant premises, and to pay negotiators. Seemingly, the lower court misconstrued *H.K. Porter* as prohibiting only the latter form of Board order directly imposing contractual provisions on the parties. But this is obviously a distinction without a difference. To order one to *cease and desist from refusing* to do something is effectively the same as

ordering one to do that same thing. Despite the lower court's simplistic denial of an *H.K. Porter* problem, the order here does require the Company to grant Union leave, to bargain on plant premises, and to pay negotiators.

True, the Board did not say "put this in an agreement". However, the Board did impose these conditions as contract equivalents. It must be noted that in *American National Insurance* the Board likewise ordered nothing inserted in a contract. Instead, the Board simply ordered the employer *to cease and desist in making its management rights proposal.* Yet, this Court found that order, too, was in excess of the Board's power to order "good faith bargaining".

Moreover, what the Board has ordered in this case constitutes an even broader invasion of an employer's rights than did the Board's order in *H.K. Porter* or *American National Insurance.* Here, the order not only is contrary to and changes the terms of the collective bargaining agreements, but also is outside the restrictions negotiated in the agreements, such as the no-strike or the grievance-arbitration provisions.

What the lower court majority failed to understand was that even if it were assumed, *arguendo,* that the Company committed unfair labor practices in dealing with the issues of Union leave, pay for negotiators, and situs of bargaining (which is the parallel to *H.K. Porter*'s bad faith bargaining), the only appropriate remedy in a refusal to bargain case is to order the Company to negotiate in good faith on these issues. An order dictating specific terms is clearly beyond the authority of the Board, despite its phrasing in "cease and desist" language.

Dissenting Judge Field saw the conflict with *American National Insurance* and *H.K. Porter* quite clearly:

> [This decision] flies in the face of *H.K. Porter* . . . by compelling Procter and Gamble to agree to a proposal of the union and requiring that it make concessions on bargainable issues.

On this ground alone, this Petition should be granted.

VI.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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